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Utah Supreme Court

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William L. Beezley; Attorney for Appellant;

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7247

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

LIVINIA ALLEN, also known as
Livinia Smith,

Appellant,

- VS. -

EDWARD F. ALLEN AND PEGGY
F. ALLEN, his wife, also known as
Alfred Saunders Allen,

Respondents.

Case No. 7247

BRIEF OF APPELLANT

ROALD A. HOGENSON, Judge

William L. Beezley,
Attorney for Appellant

FILED
NOV 29 1918
SUPREME COURT, UTAH

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That the evidence conclusively shows that the deed of January 12, 1929 was delivered by the deceased to the grantees, the appellant and respondent in this action where the deceased reserved a life estate unto herself. After the execution by Luisa Allen of said deed, she had same recorded with the County Recorder of Salt Lake County, State of Utah and Appellant contends by virtue of this fact that said deed was duly delivered.

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The court allowed Edward F. Allen and Peggy Allen, his wife, respondents to testify to conversations had with the deceased in reference to the deeds in issue in this case, and that Appellant objected to said witnesses introducing said conversations under what is commonly known as the Death Statute, and the Court granted Appellant a standing objection hereto, but allowed said evidence to be placed in the record by the said witnesses.

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IN THE
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LIVINIA ALLEN, also known as
Livinia Smith,

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- vs. -

EDWARD F. ALLEN AND PEGGY
F. ALLEN, his wife, also known as
Alfred Saunders Allen,

Respondents.

Case No. 7247

BRIEF OF APPELLANT

STATEMENT OF CASE

That on the 12th day of January 1929 the Deceased Luisa Allen a widow deeded by quit claim deed to the Appellant and the Respondent Edward F. Allen the following described tract of land in Salt Lake County, State of Utah; to-wit:

Commencing at a point $2\frac{1}{2}$ rods North of
the Southeast Corner of Lot 8, Block 41, Plat

“B”, Salt Lake City Survey; thence North $2\frac{1}{2}$ rods; thence West 10 rods; thence South $2\frac{1}{2}$ rods; thence East 10 rods to beginning

and thereupon the said Luisa Allen, Deceased delivered said deed to the County Recorder of Salt Lake County, State of Utah for the purpose of record, and the same was recorded in accordance with her request, and that said deed, upon such record was returned to her, and that she retained the instrument until her death occurred on the 2nd day of July 1947. That in said last mentioned deed, the Deceased retained a lifeestate in and to the premises involved. (Tr. 2.)

That on the 12th day of September 1946 the said Luisa Allen made and executed a quit claim deed to the Respondents, to-wit; Edward F. Allen and Peggy Allen, his wife, conveying unto them the realty involved in the litigation. (Tr. 7.)

The defense to the first deed involved is by way of equitable defense and counter-claim wherein Respondents allege several defenses, to-wit:

FIRST: That the first deed in question was never delivered, therefore second deed good.

SECOND: That in the event the first deed was delivered, it was a will, and therefore null and void.

THIRD: Moneys spent upon said premises by way of offset, contributions and subrogation, to-wit: repairs, payment of mortgage, taxes, insurance and general upkeep. (See Pleadings 1 to 127.)

The respondent Edward F, Allen testified in the trial of said cause that the payments made by him subsequent to the first deed in issue, January 12th, 1929 were made gratuitously, voluntarily and of his own free will and accord, and that he knew nothing at the time of said payments concerning the first deed in question. (Tr. 92-132.)

That at or about the time the Deceased passed away, the respondents obtained from her the second deed in question, at which time the Deceased was aged, infirm and ill. That the respondents thought that the Appellant knew of the second conveyance, when made, but was not sure. (Tr. 23-63, 92-132.)

The home involved herein had a rental value of approximately \$75.00 per month from the year 1929 to the present time. (Tr. 79-81.) That the Deceased served the respondent together with his wife over a period of years of the value for said services in the sum of \$50.00 per month. (Tr. 83-85.)

That the Respondents waived by virtue of stipulation their defense by way of contribution, subrogation and equitable defenses, and stand upon the second deed as executed by the Deceased, and which the Trial Court held to be valid which is the main issue involved herein. (Tr. 129-145.)

That subsequent to January 12th, 1929 or the execution of the first deed in question tax notices were sent out by the Treasurer's Office, Salt Lake County, State of Utah, to the three parties named in said deed, to-wit:

Livinia Allen, Edward F. Allen and Luisa Allen, addressed to 334 South 9th East Street, Salt Lake City, Utah, said notices being sent out annually from 1929 on up to and including 1947.

The Appellant resided in the home in question from 1929, date of the first deed on up until May 1936 at which time she married and vacated said premises and returned to said home in 1943 for the purpose of taking care of her Deceased Mother, and has resided therein ever since that date. (Tr. 288.)

That the Respondent Edward F. Allen resided part time alone and part time with his wife in said residence since the date of the first deed for a period of fifteen years and five months. (Tr. 289.)

Neither party paid rent on said premises during said period of time with the exception of Appellant and Respondent Edward F. Allen contributing money and services for the maintenance and support of the Mother. That Edward F. Allen gave the money each year for the payment of said taxes based upon the First Deed, and the Mother made the payments to the County Treasurer, Salt Lake County, State of Utah for the purpose of obtaining her Widow's exemption. That Edward F. Allen and his wife Peggy Allen left in the year 1943 for Tennessee, at which time the Appellant moved back in the home for the purpose of caring for the mother at the solicitation of Mrs. Peggy Allen, respondent, and remained in the home up until on or about the 12th day of September 1946, during which period of time the

Appellant paid all of the bills for coal, water and groceries and attended to the wants of her mother, (Tr. 287, 288.)

The respondents returned from Tennessee on or about the 12th day of September 1946, at which time Edward F. Allen obtained the services of a lawyer and had deed prepared in favor of Respondents conveying the title of said realty to them, and due to the physical condition of Mrs. Luisa Allen at such time she swore under oath over the telephone to a Notary Public (Tr. 287) and he had same recorded with the County Recorder, Salt Lake County, State of Utah.

That the said Luisa Allen died in Salt Lake County, Stote of Utah on Julp 2nd, 1947. (Tr. 2.)

That Mrs. Luisa Allen at no time or at all repudiated the deed executed in favor of Appellant and Respondent in 1929, and when asked by the Appellant why she had executed the second deed of 1946, she merely stated that Edward F. Allen wanted the property. (Tr. 394.

That at all times the Appellant knew of the execution of the deed of 1929 in her favor, as she and her mother went to the Office of an Attorney for the express purpose of having same drafted and duly executed. (Tr. 393.)

ASSIGNMENT OF ERRORS

Appellant assigns as error the following upon which she relies for a reversal of the judgment, decree and orders of the court:

1. That the findings and decree are not supported by the evidence.
2. That the court erred in denying Appellant's Motion for New Trial.
3. That the court erred in upholding the deed under date of September 12, 1946, and failing to uphold the deed of January 12, 1929.
4. The court erred in admitting in evidence all conversations had between deceased and respondents or either of them.

ARGUMENTS OF POINTS 1, 2, AND 3

That the evidence conclusively shows that the deed of January 12, 1929 was delivered by the deceased to the grantees, the appellant and respondent in this action where the deceased reserved a life estate unto herself. After the execution by Luisa Allen of said deed, she had same recorded with the County Recorder of Salt Lake County, State of Utah, and Appellant contends by virtue of this fact that such deed was duly delivered.

“It is already settled that the recording of a deed constitutes delivery to the grantee”

Fooshee vs. Kasenberg, 102 Pac. 2d, 995 Kan.
 Balin vs. Osoba, 91 Pac, 57, 76 Kan. 234.
 Carver vs. Main, 69 Pac. 2d 681, 146 Kan.
 251-257.

“Where the deed is intentionally recorded by the grantor, manual delivery of the deed thereafter is not necessary to make it effectual”.

Turner vs. Close, 264 Pac. 1047, 125 Kan. 485.

“In the absence of express disclaimer, the acceptance by the grantee is presumed”.

Wuester vs. Folin, 56 Pac. 490, 60 Kan. 334.

Miller vs. Miller, 131 Pac. L.R.A. 1915-A, 671
 Ann. Cas. 1917-A, 918.

That the recording of said deed by the said Luisa Allen was constructive notice to the world pertaining to said conveyance.

In the case of Payne vs. Henderson, 172 N.E. 173, 340 Ill. 160, among other things held:

“3. That the reservation of a life estate in the Grantor raises a presumption that the deed is intended to operate immediately as a conveyance of the future estate which is vest in possession at the termination of the life estate and in such case the retention of the deed by the grantor is not inconsistent with the idea that delivery was intended, and that it is operative, as there would be no object in retaining a life estate if the deed were not to be effectual as a conveyance or was retained to prevent its taking effect until the death of the grantor”.

“4. Where a grantor has reserved a life estate in the land conveyed by him, he is as much

entitled to the custody of the deed as the grantee. Also to the same effect *Humphreys vs. Humphreys*, 300 Ill. 46''.

“5. Where a grantor has conveyed a five acre tract to his granddaughter by way of voluntary settlement, reserving in himself a life estate, the fact that he subsequently sold an adjoining tract which because of some unexplained error included an eleven foot strip off the five acres does not show that his previous deed to his granddaughter was not intended to be effective.”

Also to the same effect *Riegel vs. Riegel*, 243 Ill. 622, *Hill vs. Greiger*, 250 Ill. 408.

In the case of *Johnson vs. Young Men's Bldg. & Loan Association*, 60 S.W. 2d 925, 187 Ark. 430, the court held:

“Acceptance of deed to a son from his parents will be presumed where the grant is beneficial to him. A deed to a minor son from his parents may be accepted by them for him. Where parents executed a deed to their son intending to retain possession of the property deed to their son until death of one of the parents, their retention of the deed and failure to record it held not to overcome the presumption of delivery,

Where parents executed a deed to their son intending to retain possession of the property until the death of one of the grantors, their continued possession and control and leasing of the property held not to nullify the apparent intention of delivery. Since the grantor had the intention, and purpose of retaining the possession of the property until the death of one or the other

of them, they had the right to retain the deed to effect this purpose”.

In the case of *Graham vs. Suddeth*, 97 Ark. 283, 133 S.W. 1023, the court held:

“The acceptance of deed is presumed where the grant is beneficial to the grantee”.

The court held in *Gribbs vs. Walker*, 74 Ark. 104, 85 S.W. 224:

“The fact that a deed was found among his papers at his death raises no presumption against delivery if the grantor reserved an interest in the property conveyed and therefore had an interest in the preservation of the deed”.

In the case of *McKemey vs. Ketchum*, 188 Iowa, 1081, 175 N.W. 325, the court held:

“Delivery will be presumed from the execution and acknowledgement of the deed, together with testimony tending to show intention to pass title even though grantor retains full possession of deed until his death.”

In the case of *Lawson vs. Boo*, 287 N.W. 282, Iowa, the Court held:

“After being signed and acknowledged by the grantor, is placed on record by him with intention of making the record stand for delivery, title will pass to the grantee assuming that there is acceptance by them of the title”.

In the case of *Miller vs. Miller*, 91 Kans. 1, L.R.A.

1915-A, 671, Ann. Cas. 1917-A, 918, the court held:

“The remainders are not accelerated by the refusal of the son to accept the conveyance of the life estate to him. The recording of the deed by the grantor made deed effective as to all persons benefited by it, who did not dissent. The intention of the grant is to be ascertained from the language employed in the deed”.

The case of Wuester vs. Folin, 60 Kans. 334, 56 Pac. 490, the court held:

“A formal acceptance by the grantee is not required. Where the grant is clearly beneficial to the grantee, his acceptance of it is presumed in the absence of proof to the contrary, and this presumption is not overcome of anything short of the actual dissent of the grantee”.

“Where the grantor reserves a life estate in the property and it's possession and control, his retention of the deed is not inconsistent with the idea that a delivery was intended.”

See 18 Corpus Juris Section 96, page 201 - Note 48.

Appellant calls the court's attention to Section 78-3-2 Volume 4, Utah Code Annotated 1943

“Every conveyance or instrument in writing affecting real estate executed, acknowledged or provided and certified in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any Court of record in this State or a copy thereof

required by law to be recorded in the Office of the County Recorder shall from the time of filing of the same with the recorder for record *import notice to all persons of the contents thereof* and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice.”

In the case of Sheppick vs. Sheppick et al, 138 Pac. 1169 (Utah)

“Wherein a man and woman had a large family of children, the oldest of whom was nineteen years of age. He purchased acreage and a small home for his Mother and Father, paying \$300.00 therefor, and obtaining a deed running in his favor to the permises. The Mother and Father were old, sick and indigent. They took possession and raised their family. The court held under all circumstances that the Father held and owned a life estate therein, and that the son, who purchased the premises held the fee thereto as remainderman. That the father and mother, during their life time paid the taxes assessed against the premises. They tore down the home and erected a new home, cultivated the soil and planted fruit trees. That at the time the father died, the value of the property had been increased from \$300.00 to approximately \$1500.00, and the heirs of the deceased attempted to obtain contribution by way of the improvements that enhanced the value of the premises wherein said court stated:

“No doubt the court based its conclusion upon the fact that the value of the land had been enhanced through the efforts and labor of the defendant and his family. While it is true that

the purchase price of the land was only \$300.00 or \$350.00 and that the value thereof with the improvements which were placed thereupon by the family was at the time of the trial shown to be about \$1500.00, yet it is also true that defendant and the family enjoyed the use of the land during all those years with whatever improvements they placed thereon. And then the equities therefore were not all in favor of plaintiff or defendant. The legal title of said land was and now is in plaintiff's name, and that gives him the right to the whole land unless he has voluntarily disposed of it or has been legally deprived of his title".

"We know of no principal, either legal or equitable by which the plaintiff under the facts and circumstances of this case can be deprived of his land, or any part thereof. If we could deal with the matter in accordance with what may be termed fireside equity or justice or from a purely moral point of view, we should probably not feel inclined to criticise the result reached by the District Court. We are reminded, however that courts under our system of jurisprudence are not autocrats, and that their judgments and decrees must be sanctioned by and passed upon established legal and equitable rules, and not upon mere moral rights or claims, From a moral point of view, the plaintiff should perhaps share the enhanced value of the property with his brothers and sisters, but we know of no legal or equitable principal by which he can be required to do so. Both the father and mother having died, he is entitled to claim his own. The District Court therefore erred in attempting to enforce what may be termed to be a purely moral obligation".

ARGUMENT ON POINT 4

The court allowed Edward F. Allen and Peggy Allen, his wife, respondents to testify to conversations had with the deceased in reference to the deeds in issue in this case, and that appellant objected to said witnesses introducing said conversations under what is commonly known as the death statute, and the court granted appellant a standing objection thereto, but allowed said evidence to be placed in the record by the said witnesses.

Section 104-49-2 Utah Code Annotated 1943, Volume 6, Subdivision 3:

“A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends as Guardian of an insane or devisee of any deceased person or as Guardian, assignee or grantee directly or remotely of such heir, legatee or devisee as to any statement by, or transaction with such deceased, insane or incompetent person or matter of fact, whatever which must have been equally within the knowledge of both the witnesses, and such insane, incompetent or deceased person unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending in such action, suit or proceeding”.

Subdivision (3) of this section applies wherever

and whenever the interest of the witnesses called are hostile and adverse to, and in conflict with the interests of the person against whom they are called. Such witnesses being parties to the action, and directly interested in the event thereof.

Mawson vs. Gray, 78 U. 542, 551, 6 Pac. 2d, 157.

STATEMENT AND ARGUMENT UPON THE PARTICULAR QUESTIONS INVOLVED

The main issue involved in this case at this time is whether or not the first deed executed on January 12, 1929 by the deceased, wherein she reserved a life estate in and to said premises, is valid. In connection with its validity, there is only one question raised, to-wit: Was said deed delivered in accordance with law? On this question the record conclusively shows that the deed was regularly signed and executed by the deceased, and thereafter by her recorded with the County Recorder of Salt Lake County, and that at all times mentioned the appellant knew of such conveyance. The respondents having testified that they knew nothing of same until after they obtained a deed to said premises by virtue of the conveyance under date of September 12, 1946. That Luisa Allen retained possession of the deed of 1929 after it had been recorded on up until the time of her death, which is not inconsistent with delivery of title,

and the logical thing to do by a party who holds a life estate and the remainderman named therein receiving no title to the premises until her death. That since the year 1929 up to the year of 1947 inclusive, tax notices were sent annually to the place of the abode of the parties to this action, and upon said tax notices appeared the names of the three parties named in said deed. That Edward F. Allen paid the taxes upon said premises in accordance with said tax notices, and that the said Edward F. Allen occupied said premises as his home since the year 1929 over a period of fifteen years and five months. That at no time or at all did the appellant disaffirm her interest in and to said deed, and whatever Edward F. Allen desired to do with his interest therein was his privilege, although at this stage of the case, he has openly rejected and renounced any interest in and to said conveyance. The writer sincerely contends that the facts and circumstances in this case surrounding the first deed in question conclusively shows an unqualified delivery under law.

The second deed upheld by the Trial Judge executed years subsequent to the first deed conveyed, if any thing, the deceased's life estate, and upon her demise any interest in and to said property by virtue of said conveyance was extinguished. Edward F. Allen testified that all payments that he made as shown by the Bill of Particulars in this case were made for the sole benefit of his mother, and were made voluntarily and gratuitously, and not for the purpose of protecting him as a

remainderman under the first deed for the reason that he at no time knew anything about the first conveyance, and still in view of the fact by virtue of numerous pleadings asked for contribution and subrogation, and after claiming contribution and subrogation, he and his wife demanded the entire property by virtue of the second deed. The position taken in this case by the respondents by virtue of their equitable counter-claims involves distinct equitable actions which are repugnant to and inconsistent with one another:

1st: They rely upon the first quit claim under date of January 12, 1929, and demanded contribution and subrogation.

2nd: They rely upon second deed under date of Sept. 12, 1946, claiming title to said premises thereunder.

3rd: That the deed of January 12, 1929 was in truth and in fact executed by Luisa Allen as her Last Will & Testament and therefore void, although the respondent Edward F. Allen made the respective payments by virtue of the fact that he was heir at law of his deceased mother, and made them to protect his right of inheritance together with that of the Appellant, his sister.

It is fundamental in equitable jurisprudence that a party cannot claim relief upon matters and things that are not germane to his original claim, and it is apparent by the pleadings in this case that the respondents desired to set up as many distinct and separate transactions upon which to stand as could be conceived, and of course,

it is a cardinal principal of equity that a party seeking relief must show good faith, and as the records now stand, there is only one proposition involved, and that is, which of the deeds in question are valid.

There is no dispute between the parties that the reasonable rental value of the premises in issue was and is \$75.00 per month. That over a period of fifteen years, and five months the respondents occupied said premises, and under the record in this case the proportionate part of respondents' rental value would be in excess of the sums that were paid by them.

Appellant sincerely contends that the Trial Court erred in holding that the first deed was invalid for lack of delivery, and in upholding the second deed thereby vesting title in respondents and that said cause should be reversed with instructions to the Trial Judge to enter proper Findings, Decree and Judgment in accordance with the contention of appellant herein, Appellant should recover her costs and expenses incurred in this Appeal.

Respectfully submitted,

WM. L. BEEZLEY,
Attorney for Appellant.